Supreme Court, U.S.
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No. 98-1796

In The

Supreme Court of the United States

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF PARTIES AND CORPORATE AFFILIATES PURSUANT TO RULE 29.6

Norwest Bank Colorado, N.A. is a party respondent. Norwest Bank Colorado, N.A. serves as Trustee for one Robert Sears, one of the heirs of John Trostel. Norwest Bank Colorado, N.A. has no non-wholly owned subsidiaries. Its parent corporations are Wells Fargo & Company, Independent Bancorp of Arizona, Inc., Mountain Bancshares, Inc. and Metropolitan Bancshares, Inc.

TABLE OF CONTENTS

Page

STATEMENT OF PARTIES AND CORPORATE AFFILIATES PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. THE "QUESTIONS PRESENTED" BY THE PETITION ARE NOT PROPERLY CONSIDERED BECAUSE THIS COURT HAS ALREADY DENIED CERTIORARI REGARDING THOSE ISSUES 7

II. EVEN IF THE EIGHTH CIRCUIT'S *TROSTEL I* INTERPRETATION OF SECTION 5118(D)(2) COULD BE CONSIDERED, NO SPLIT OF AUTHORITY EXISTS REGARDING INTERPRETATION OF THIS STATUTE 8

III. ENFORCING CONTRACTS AS THEY ARE WRITTEN AND REQUIRING SOPHISTICATED ASSIGNEES TO READ THE TERMS OF CONTRACTS TO WHICH THEY OBLIGATE THEMSELVES WILL NOT HAVE "PROFOUND CONSEQUENCES" ON THE COMMERCIAL REAL PROPERTY MARKET 14

IV. THE EIGHTH CIRCUIT'S MOST RECENT OPINION ONLY INVOLVES QUESTIONS OF IOWA STATE CONTRACT LAW THAT DO NOT WARRANT REVIEW BY THIS COURT 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Adams v. Burlington Northern R. Co., 80 F.3d 1377 (9th Cir. 1996), *cert. denied*, 519 U.S. 864 (1996) 9, 10, 13

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 7

Fay Corp. v. BAT Holdings I, Inc., 646 F. Supp. 946 (W.D. Wash. 1986) 12, 13

Fay Corp. v. Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990) 9, 10

Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry., 629 P.2d 947 (Alaska 1982) 10

Grand Avenue Partners, L.P. v. Goodan, 160 F.3d 580 (9th Cir. 1998) 10, 11, 12, 13

Klipp v. Iowa Grain Indemn. Fund. Bd., 502 N.W.2d 9 (Iowa 1993) 12

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 8, 9

Singleton v. Comm'r of Internal Revenue, 439 U.S. 940 (1978) 8

Trostel v. American Life & Cas. Ins. Co., 133 F.3d 679 (8th Cir. 1998), *cert. denied*, 118 S. Ct. 2359 (1998) 3, 4, 5, 7, 8

Trostel v. American Life & Cas. Ins. Co., 92 F.3d 736 (8th Cir. 1996), *vacated*, 117 S. Ct. 939 (1997) .. *passim*

United States v. Shabani, 513 U.S. 10 (1994) 14

TABLE OF AUTHORITIES – Continued

Page

Vernon v. Resolution Trust Corp., 907 F.2d 1101 (11th Cir. 1990) 14

Wells Fargo Bank v. Bank of America, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995)..... 12, 13, 14

STATUTES

31 U.S.C. § 5118(d)(2)..... *passim*

OTHER AUTHORITIES

Pub. L. No. 105-61, § 641 (1997) 3

STATEMENT OF THE CASE

In 1917, a real estate lease was entered into by John Trostel, as lessor, concerning a commercial building in Des Moines, Iowa. The term of the lease was ninety-nine years, and the lease contained a gold clause which provided that "[a]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." This clause was used, as was typical in that day, as a price-indexing mechanism to protect against the effects of inflation.

In 1933, Congress declared that gold clauses were unenforceable and against public policy and made such obligations payable in United States dollars. In 1977, Congress again acted by amending the underlying statute and reinstating the enforceability of gold clauses which were part of obligations issued after October 27, 1977. 31 U.S.C. § 5118(d)(2) (hereinafter referred to as "Section 5118(d)(2)").

Petitioner in this action, American Life and Casualty Insurance Co. ("American Life"), assumed all obligations of this lease by novation in 1990, and now opposes the enforcement of the gold clause by Respondents, the heirs of John Trostel. Payment to Respondents in gold coin was demanded in 1993. American Life has paid no rent since that time.

The United States Court of Appeals for the Eighth Circuit found the gold clause at issue to be enforceable under the 1977 statutory amendment reinstating the enforceability of such clauses because the 1990 novation to American Life constituted a new contract, by which

American Life had assumed all obligations of the original 1917 lease. *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *vacated*, 117 S. Ct. 939 (1997) (hereinafter *"Trostel I"*). The Eighth Circuit remanded the case for factual inquiry by the district court regarding the meaning of the gold clause term "present [standard] of weight and fineness" for purposes of entry of judgment in favor of Respondents. *Trostel I* at 743.

Shortly thereafter in 1996, Congress amended the underlying statute by adding a provision to an otherwise unrelated act, which read in pertinent part:

> This paragraph does not apply to an obligation issued after October 27, 1977. **This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.**

31 U.S.C. § 5118(d)(2) (1996 amendment emphasis added). The amendment also provided that it was not applicable to obligations "finally adjudicated" before the amendment's passage.

Petitioner requested that this Court grant certiorari as to the effect of the 1996 amendment on the Eight Circuit's opinion, and more significantly, whether, regardless of the 1996 amendment, the Eighth Circuit improperly interpreted American Life's 1990 assumption of the leasehold obligation to be a novation which constituted an obligation issued after October 27, 1977 thereby reviving the enforceability of the gold clause. This Court then granted certiorari, vacated the decision of the Eighth

Circuit, and remanded to the Eighth Circuit for further consideration in light of the 1996 amendment. 117 S. Ct. 939 (1997).

Before the matter could be reconsidered by the Eighth Circuit, Congress again acted. The legislation, enacted on October 10, 1997, provided that the language added in the 1996 amendment was stricken. Pub. L. No. 105-61, § 641. After considering the 1996 amendment and its 1997 repeal, the Eighth Circuit reinstated its previous decision. *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679, 681 (8th Cir. 1998) (hereinafter *"Trostel II"*). The Eighth Circuit concluded that the gold clause is enforceable as a consequence of the 1990 novation in light of either amendment, reasoning that even if the 1996 amendment remained applicable to this case, the parties had specifically agreed to include a gold clause by agreeing to be bound by "all the terms and conditions" of the original lease and concluding that the 1997 repeal was retroactive. *Trostel II* at 681-82. The Court again reiterated its prior conclusion that the 1990 novation was an obligation issued after October 27, 1977. *Id.*

Again American Life sought a grant of certiorari from this Court, questioning the effects of the 1996 and 1997 statutory amendments and refreshing its argument that the Eighth Circuit's opinion in *Trostel I* was erroneous because the 1990 novation did not constitute a new obligation issued after October 27, 1977. This Court denied certiorari. 118 S. Ct. 2359 (1998).

In the interim, American Life sought to unilaterally modify their obligation under the gold clause by assigning the lease in 1997 to its sister corporation, Vulcan Life

Insurance Company ("Vulcan"), specifically disclaiming the gold clause from the assigned obligation assumed by Vulcan. American Life asserted that it had, by way of the 1997 assignment, "turned off" the gold clause and eliminated it from the lease obligation entirely.

With all of Petitioner's appeals regarding the applicability of Section 5118(d)(2) having been exhausted by virtue of the Eighth Circuit's opinion in *Trostel II*, reinstating *Trostel I*, and this Court's denial of Petitioner's 1997 Petition for writ of certiorari, the district court entered judgment in favor of Respondents. The district court considered the parties' positions with respect to the meaning of the term "present standard of weight and fineness" in accordance with the instruction of the Eighth Circuit in *Trostel I*, to determine the precise amount of American Life's continuing rental obligation. The district court concluded that the gold clause mandated that American Life must satisfy their continuing rental obligation in "gold coin of the United States" in accordance with the 1917 standard of weight and fineness, not the 1990 standard of weight and fineness. The district court rejected argument from American Life that the 1997 assignment to Vulcan had eliminated the gold clause from the rental obligation.[1]

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[1] Rule 15 requires Respondents to point out that the Petition contains at least two significant misstatements of fact on pages 10 and 11. First, the parties never reached agreement concerning how the face amount of the rental obligation would be precisely calculated or what the value of gold was in 1990. The district court did not address the issue and American Life presented no evidence on the issue. Secondly, American Life asserts that the district court "made no effort to explain how the

American Life then appealed to the Eighth Circuit again, raising the following issues: whether the term "present standard of weight and fineness" means the standard in 1990, or the standard as it existed in 1917; and whether the 1997 assignment to Vulcan, excluding the gold clause, had eliminated the clause from the future rental obligation? The Eighth Circuit affirmed the district court's judgment regarding these issues, rejecting American Life's arguments.

REASONS FOR DENYING THE WRIT

Consideration of the "Questions Presented" by American Life's Petition for Writ of Certiorari is not proper since those questions were not "pressed or passed upon" by the Eighth Circuit in its third consideration of this case. The very simple reason that the Eighth Circuit did not consider or pass upon those questions is because the Eighth Circuit *had already decided* those issues in *Trostel I*, reinstated that decision in *Trostel II*, and this Court's denial of a writ of certiorari following *Trostel II* completed all proper federal appellate consideration of those questions.

1997 assignment differed from the 1990 assignment, which modified the lease to incorporate by reference the gold clause." To the contrary, the district court stated specifically that "[b]ecause American Life did not transfer the entire leasehold in the 1997 assignment and may not unilaterally modify the scope of the obligation of that leasehold, it remains obligated for payment of rent in accordance with the gold clause." Petition, pp. 16a-17a.

None of the reasons offered by American Life in its Petition for Writ of Certiorari satisfy this Court's standards for accepting a case for review. This Court requires, pursuant to Rule 10, "compelling reasons" for granting certiorari, and this case presents none of the "compelling reasons" which deserve this Court's discretionary review. Contrary to Petitioner's misrepresentations, there is no split of legal authority concerning the interpretation of Section 5118(d)(2) between any federal court of appeals and another federal court of appeals or state court of last resort. Petitioner simply misconstrues the opinions of courts that have applied the plain language of Section 5118(d)(2). Therefore, even if American Life's redundant presentation of questions concerning Section 5118(d)(2) were properly presented to this Court, Rule 10(a) is not satisfied and American Life should be denied a writ of certiorari.

Buried in American Life's "Reasons for Granting the Writ" are the questions most recently decided by the Eighth Circuit although those issues are not contained in the "Questions Presented" by American Life's Petition. These issues are the only questions timely and properly raised to this Court. They present only questions of Iowa contract law interpretation which do not properly invoke this Court's discretionary review. Therefore none of the compelling considerations required by Rule 10 are presented by the Petition, and American Life's writ should be DENIED.

I. THE "QUESTIONS PRESENTED" BY THE PETITION ARE NOT PROPERLY CONSIDERED BECAUSE THIS COURT HAS ALREADY DENIED CERTIORARI REGARDING THOSE ISSUES.

American Life's appeal to this court for review of any question regarding interpretation of Section 5118(d)(2) and whether the 1990 novation to American Life is an "obligation issued" after October 27, 1977 is redundant. Contrary to Petitioner's unsupported assertion that the Eighth Circuit's opinion in *Trostel II* was "interlocutory in nature," the *Trostel II* opinion was a final adjudication as to American Life's obligation under the gold clause and the enforceability of that gold clause under Section 5118(d)(2). The Eighth Circuit's *Trostel II* opinion specifically reinstated the final judgment of *Trostel I*. It is established that a "final decision is one that ends the litigation on the merits." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (citations omitted). Even though a factual inquiry remained to be conducted by the district court, on remand pursuant to *Trostel I*, to determine the precise meaning of the terms of the gold clause in order to determine the precise amount of the rental obligation, that factual inquiry was only necessary because the district court had not previously reached that issue. That procedure does not make the Eighth Circuit's opinion in *Trostel II* "interlocutory" since "[a] question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." The district court's determination of the meaning of the gold clause term "present standard of weight and fineness" was only necessary in

order to execute the Eighth Circuit's final decision that American Life was bound by the gold clause. *Trostel II* found that the 1996 and 1997 amendments to Section 5118(d)(2) ultimately had no effect on the outcome of the Court's previous analysis and reinstated the judgment awarded to Respondents in *Trostel I*. Therefore, there is nothing "interlocutory" about either *Trostel I* or *Trostel II*. American Life filed a timely petition for certiorari seeking review of the Eighth Circuit's final adjudication on the merits concerning the enforceability of the gold clause under Section 5118(d)(2). This Court then appropriately rejected that petition and denied American Life a writ of certiorari. 118 S. Ct. 2359 (1998). The Petition before the Court now simply seeks a "second bite" at the same apple from which this Court has determined American Life's questions did not merit a first bite. Therefore, no writ should be granted to American Life.

II. EVEN IF THE EIGHTH CIRCUIT'S *TROSTEL I* INTERPRETATION OF SECTION 5118(d)(2) COULD BE CONSIDERED, NO SPLIT OF AUTHORITY EXISTS REGARDING INTERPRETATION OF THIS STATUTE.

Rule 10(a), and cases construing this rule, demonstrate that "[t]he absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion in denial of certiorari). American Life mischaracterizes existing opinions in attempting to craft a split of authority where none exists. There is no "embarrassing conflict of opinion and authority between the circuit courts of appeal," *NLRB v. Pittsburgh S.S. Co.*,

340 U.S. 498, 502 (1951) (citations omitted), and instead the cases relied upon by American Life clearly establish the consistent opinion that the *novation of a lease* containing a gold clause after October 27, 1977 does indeed render the gold clause enforceable pursuant to Section 5118(d)(2).

American Life seeks to re-characterize a long-term lease as a "long-term debt obligation" analogous to a long-term bond in order to convince this Court that a split of authority exists between the Eighth and Ninth Circuits regarding exactly when an obligation is "issued" pursuant to Section 5118(d)(2). Even if American Life does not comprehend the distinction between the assignment of a lease and the novation of a lease, and the distinction between a bond and a lease, the Eighth and Ninth Circuits have demonstrated their understanding of these distinct legal concepts and applied Section 5118(d)(2) uniformly.

The Ninth Circuit determined in 1990 that the novation of a lease, in which a new obligor is substituted for the original obligor, was "a new obligation for the purposes of [Section] 5118(d)(2)." *Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990). The Eighth Circuit considered the Ninth Circuit's reasoning and similarly concluded in *Trostel I* that American Life was similarly substituted by novation in 1990, and thus Section 5118(d)(2) made the gold clause enforceable by Respondents against American Life.

The Ninth Circuit returned to Section 5118(d)(2) in *Adams v. Burlington Northern R. Co.*, 80 F.3d 1377 (9th Cir. 1996) to explain that a bond containing a gold clause was

a distinctive type of "financial instrument[ ] inherently different from leases," and clarifying that the negotiable nature of bonds required a different conclusion regarding their date of "issuance" for purposes of Section 5118(d)(2). *Id.* at 1382.[2] The Ninth Circuit specifically distinguished the bond presented in *Adams* from the lease presented in *Fay Corp.* Because the Eighth Circuit's opinion in *Trostel I* is consistent with the Ninth Circuit's opinion in *Fay Corp.*, which was further explained and unchanged by the Ninth Circuit's analysis in *Adams*, no split of authority is presented by *Adams*.

American Life also asserts that the Ninth Circuit's opinion in *Grand Avenue Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998) creates a conflict between the Eighth and Ninth Circuits. A careful reading of the *Grand Avenue*

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[2] Petitioner also attempts to craft a split of authority between the Eighth Circuit and the Alaska Supreme Court based on that court's opinion in *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 629 P.2d 947 (Alaska 1982). The *Gold Bondholders* court determined, in analysis relied upon by the Ninth Circuit in *Adams*, that the negotiable character of a bond negated the bondholder's argument that subsequent sale of the bond constituted "novation" for purposes of determining when the bond obligation was issued under Section 5118(d)(2). In *Adams*, the Ninth Circuit agreed with the Alaska court's reasoning that "determinations regarding the issuance date of a bond [for purposes of Section 5118(d)(2)] should 'focus on the legal structure of the bonds and not novation.' " *Adams*, 80 F.3d at 1382 (citing *Gold Bondholders*, 649 P.2d at 950). Therefore, American Life's assertion that *Gold Bondholders* demonstrates a split of authority is erroneous for the same reasons presented here that demonstrate that no split of authority exists between the Eighth and Ninth Circuits by virtue of *Adams*.

opinion demonstrates that just the opposite is true. The *Grand Avenue* court was required to construe the language of the post-October, 1977 assignment which contained the *limited* release of the lease's original obligor from "all direct liability hereunder accruing" after the assignment of the lease to the new obligor. The issue at hand in *Grand Avenue* was whether a *novation* had occurred, as opposed to an assignment and assumption of only part of the original obligation. The *Grand Avenue* lessor relied upon the Eighth Circuit's reasoning in *Trostel I*, but the Ninth Circuit concluded properly that *Trostel I* did not affect the court's analysis because the facts of *Trostel I* were, and still are, different from those facts presented in *Grand Avenue*. The Ninth Circuit affirmed the district court's conclusion that no novation had occurred after considering the application of California statutes and contract law construing novations and assignments. Thus, the Ninth Circuit recognized what American Life does not understand after three opinions from the Eighth Circuit: that the distinction between an assignment, as presented in *Grand Avenue*, and a novation, as presented here, governs the applicability of Section 5118(d)(2).

The Ninth Circuit's analysis in *Grand Avenue* therefore further demonstrates that the Eighth and Ninth Circuits *agree* that the *novation* of a *lease* constitutes a new obligation under Section 5118(d)(2) and holds that a partial assignment does not constitute a new obligation. American Life argued in *Trostel I* that no novation had occurred, and the Eighth Circuit rejected that argument and found, pursuant to Iowa contract law, that a novation

had occurred.[3] Therefore the Eighth Circuit's reasoning in *Trostel I* is directly in line with that of the Ninth Circuit as

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[3] The contract law of the various states which have considered Section 5118(d)(2) is reasonably consistent in recognizing when a novation has occurred and what effect that novation has on the parties to the new obligation. *See Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995) (construing California contract law on novation); *Fay Corp. v. BAT Holdings, I, Inc.*, 646 F. Supp. 946, 950 (W.D. Wash. 1986) (construing Washington law on novation); and *Trostel I*, 92 F.3d at 740 (construing Iowa law on novation based on review of *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa. 1993 (quoting Restatement (Second) of Contracts § 280 (1981)))). Generally put, state law characterizes a novation to have occurred upon the *complete* substitution of a new obligor who assumes the entire obligation due to the obligee. The scope and nature of the obligation is unchanged, but a new obligor has stepped into the shoes of the original obligor, and thus a new obligation has been created. This is often called a "simple novation," and the original obligor is relieved of all liability to the obligee. The terms of the original obligation may, as in this case, waive the consent of the obligee before a *simple* novation may occur.

In contrast, the new obligor's assumption of anything *less than* all of the obligation due to the original obligee is not a simple novation, but instead the original obligor remains liable to the obligee for any "remainder" of the obligation not assigned to the new obligor. Because the obligee remains entitled to complete satisfaction of the bargained-for performance, both the new obligor and the original obligor remain liable to the obligee, or consent of the obligee is required to modify the scope or nature of the original obligation. In *Grand Avenue*, the Ninth Circuit was faced with this type of assignment of the leasehold obligation, since the original obligor retained liability to the obligee even after the assignment was executed, so the Ninth Circuit concluded that, pursuant to California contract law, no novation had occurred. The Ninth Circuit thereafter rightly concluded that *Trostel I* had no effect on the

explained and applied in *Fay Corp.*, *Adams*, and *Grand Avenue*, and no split of authority exists to support a writ of certiorari.

American Life further contends that a uniform federal definition of Section 5118(d)(2)'s term "obligation issued" is necessary, and that certiorari should be granted because application of state contract law will create inconsistent definitions of the same term equivalent to a reviewable split of authority. But all courts which have construed when an obligation is issued for purposes of Section 5118(d)(2) have deemed it necessary to determine when the obligation was "entered into" contractually. American Life concludes that *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995), creates "perverse incentive" for lessors to seek enforcement of gold clauses. But it was the *Wells Fargo* court that stated exactly why the interpretation of Section 5118(d)(2)'s "obligation issued" language is a matter of state contract law interpretation. The *Wells Fargo* court analyzed the legislative history and intent behind Section 5118(d)(2) and plainly stated that the phrase "obligation issued" was unambiguous and that because the legislative history demonstrated that the statute was aimed to address contracts "entered into" after the enactment of the bill, those gold clauses "remain subject to traditional laws of contract, as judicially interpreted" to determine precisely when the obligation was "entered into." *Wells Fargo*, 38 Cal. Rptr. 2d at 526, 527. It is a settled principle of

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court's analysis since a novation did occur in this case by virtue of American Life's 1990 assumption of the *entire* obligation of the 1917 lease from Statesman.

statutory construction that "absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994). As the *Wells Fargo* court obviously understood, state contract law controls interpretation as to when a contract was "entered into" since "there exists no federal law of construction of contracts." *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990). Therefore, the application of state contract law to determine when an obligation is issued does not create an inconsistent application of Section 5118(d)(2).

III. ENFORCING CONTRACTS AS THEY ARE WRITTEN AND REQUIRING SOPHISTICATED ASSIGNEES TO READ THE TERMS OF CONTRACTS TO WHICH THEY OBLIGATE THEMSELVES WILL NOT HAVE "PROFOUND CONSEQUENCES" ON THE COMMERCIAL REAL PROPERTY MARKET.

American Life worries that lessors "armed with ancient gold clauses" will paralyze the commercial real property marketplace with their efforts to enforce "previously meaningless and long-forgotten" gold clauses against "unwitting" assignees. This "gold rush," argues American Life, will result in "profound consequences" which should invoke the discretionary review of this Court. What is profound, indeed, about this case is that a sophisticated entity such as American Life would knowingly and voluntarily assume the terms of a long-term lease, expressly binding itself to perform the obligations defined by the terms of that lease, *without even reading the lease*. What is also profound is that lessors will actually

receive the benefit of their bargain, by enforcement of gold clauses for the purpose they were intended to serve – to protect against inflation. While the consequences of the Eighth Circuit's three prior decisions in this case may be profound between these parties, no wide-spread economic catastrophe will result from the enforcement of this lease as it is written and as the parties to the lease intended it to operate in 1917. American Life's writ should be denied.

IV. THE EIGHTH CIRCUIT'S MOST RECENT OPINION ONLY INVOLVES QUESTIONS OF IOWA STATE CONTRACT LAW THAT DO NOT WARRANT REVIEW BY THIS COURT.

The only questions presented by American Life which are timely appealed and properly included in the Petition also do not warrant this Court's review because they are simply complaints regarding the Eighth Circuit's interpretations of Iowa contract law. The Eighth Circuit concluded that the lease's contractual term "present standard of weight and fineness" means the 1917 standard of weight and fineness, as opposed to the 1990 standard of weight and fineness. In reaching this conclusion, the Eighth Circuit relied on its previous factual conclusion in *Trostel I* that the 1990 novation to American Life expressly incorporated all of the terms of the 1917 lease, and the Eighth Circuit applied Iowa contract law to conclude that American Life's intent in 1990 had no effect on the meaning of the word "present" as originally included in the 1917 lease.

Additionally, the Eighth Circuit concluded that Iowa contract law does not permit American Life to simply

choose to relieve itself of its gold clause obligation by unilaterally modifying the terms of the lease to eliminate the gold clause by assigning all of the obligations of the 1917 lease, except the gold clause, to Vulcan. Even if the Eighth Circuit had erroneously interpreted Iowa contract law, misapplied a properly stated rule of Iowa contract law, or reached an erroneous factual finding, such error would not be a sufficient basis under Rule 10's demanding standards that American Life demonstrate a "compelling reason" for discretionary review.

CONCLUSION

Petitioner has failed to present issues which are proper or sufficient to invoke the discretionary review of the Supreme Court of the United States. For that reason, and all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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